No. 03-5011-CV-SW-F-JG, 2005 WL 1532955 (W.D. Mo. June 27, 2005); *Pharmacia Corp. v. Clayton Chem. Acquis. LLC*, No. 02-CV-0428, 2005 WL 615755 (S.D. Ill. Mar. 8, 2005). Nevertheless, the issue remains open and subject to debate in the literature. *E.g.*, Richard J. Faulk & Cynthia J. Bishop, *There and Back Again: The Progression and Regression of Contribution Actions Under CERCLA*, 18 Tul. Envtl. L.J. 323, 333 (2005). The question cries out for prompt and authoritative resolution. Olin's recognition of the absence of guidance from the courts of appeal, (Br. in Opp. 18.), actually underscores the need for this Court to act in this case, either by settling the question itself on certiorari, or at least by entering a GVR requiring the court of appeals to address the merits of the question.[4]

IV. Even Apart From *Cooper Industries*, This Court Should Grant Certiorari to Preclude Application of a New and Expansive Theory of CERCLA Liability Against Customers of Hazardous Waste Generators.

This Court should also grant certiorari, as it did in *United States v. Bestfoods*, 524 U.S. 51 (1998), to prevent a dramatic expansion of potential liability under CERCLA. The result in

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[4] Olin's claim that the exercise would be meaningless because a direct cost recovery claim under section 107 will lead to the same result even in the absence of a contribution claim is erroneous. As a potentially responsible party, Olin has no right to assert a direct cost recovery action under section 107. This was the holding of the Sixth Circuit in *Centerior*, and of every other Circuit to address the issue before this Court's ruling in *Cooper Industries*. *Cooper Indus.*, 125 S. Ct. at 585; *Centerior*, 153 F.3d at 349, 356 (collecting cases). *But cf. Consol. Edison Co. of NY v. UGI Utils., Inc.*, No. 04-2409-CV, — F.3d —, 2005 WL 2173585 (2d Cir. Sep. 9, 2005). Moreover, any potential Olin claim under section 107 is barred, in any event, because the trial court here applied *Centerior* to dismiss it, (Mem. & Order, dated Feb. 23, 1999, at 2), and Olin did not appeal the dismissal.

this case, when contrasted with the result in *Bestfoods*, is incongruous. The decision below subjects a large customer of a polluting company to a higher risk of CERCLA liability than the parent corporation of the very same polluting company, even though the parent company has actual and complete control over the polluting company, and the customer has, at most, some economic leverage. The result below also creates the potential for an end run on this Court's unanimous decision in *Bestfoods* that a parent corporation cannot be liable as an operator under section 107(a)(2) of CERCLA for pollution caused by its subsidiary based simply on its ownership and control of the subsidiary. If the result in this case stands, *Bestfoods* will wither into irrelevance because even though the parent corporation enjoys protection from liability for its subsidiary's pollution as an operator under section 107(a)(2) of CERCLA, it will still be liable for the subsidiary's polluting acts as an arranger under section 107(a)(3) based on precisely the same factors this Court found insufficient to impose liability in *Bestfoods*. This Court can prevent that result by granting certiorari to enforce the statutory requirements that a party "own or possess" the hazardous substances disposed of—a finding the trial court did not make in this case—and that a party actually arrange for the disposal of the hazardous substances, and not simply have a close relationship with, or even a measure of control over, the actual arranger.

The courts' decisions below expand CERCLA liability to customers by imposing arranger liability on GenCorp even though GenCorp did not make the actual arrangements for disposing of the hazardous waste and even though GenCorp did not own or possess the hazardous substances. Olin—not GenCorp—was the only party that owned and possessed the hazardous waste disposed of at Big D, and Olin—not GenCorp—made the actual arrangements for disposal. Olin

owned and operated the TDI plant. (App. 42a.) Olin produced the TDI using Olin's proprietary process. (App. 35a, 46a.) Olin owned the TDI and the TDI waste produced by the plant. (*See id.*) Olin profited from the sale of the TDI. (App. 44a-45a.) Olin hired the waste hauler to transport its TDI waste and dump it at Big D. (App. 8a.) In short, Olin's plant, using Olin's process, created TDI and TDI waste, and Olin arranged for its disposal at Big D.

These factual conclusions, which are undisturbed on appeal, demonstrate that it was Olin—not GenCorp—that actually "owned or possessed" the wastes at issue, and that it was Olin—not GenCorp—that actually "arranged for disposal" of the material at Big D. Indeed, it is undisputed that the actual contract for disposal was on an Olin purchase order. (App. 8a.) The decisions below soften the statutory barriers to liability in precisely the same way that this Court attempted to prevent in *Bestfoods*. The decision below demonstrates that this Court needs, once again, to enforce the plain language of CERCLA to prevent creation of yet another expansive, policy-oriented theory of environmental liability.

CONCLUSION

This case squarely presents the question this Court reserved in *Cooper Industries* of whether a section 106 UAO is "civil action" that triggers a right to contribution under section 113(f)(1) of CERCLA. Because this and the other issues presented in GenCorp's petition are of national importance, involving nearly 1,000 UAOs and billions of dollars in cleanup expenses, this Court should grant a writ of certiorari or, in the alternative, issue a GVR order and send the case back to the court of appeals for consideration of the effect of this Court's decision in *Cooper Industries* on Olin's right, if any, to CERCLA contribution for costs incurred under a UAO.

September 15, 2005

Respectfully submitted,

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